

Faskh (divorce) and intestate succession in Islamic and South African law: impact of the watershed judgment in Hassam v Jacobs and the Muslim Marriages Bill*

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Abstract

This article deals with intestate succession against the background of the complex Islamic legal aspects of *faskh* and *talaq* as forms of divorce. It elaborates on the divergent views held by Islamic scholars and explains the foundational principles of Islamic law. The article offers a new perspective on the ground-breaking case of *Hassam v Jacobs* and sheds light on its surrounding circumstances and factual background in order to indicate that the Cape High Court may have unnecessarily pronounced on the recognition of polygynous Muslim marriages, an issue which in fact may not have been before the court. The article also examines how the Islamic law of divorce is practically administered by Islamic organisations within Cape Town. Practical recommendations are offered for dealing with the complexities of recognising and administering aspects of Islamic law in secular courts and the interaction with Islamic bodies administering Muslim personal law.

I Introduction

Currently in South Africa, potentially polygynous¹ Muslim religious marriages that have not been solemnised as heterosexual civil marriages in terms of the Marriage Act² or the Civil Union Act³ are void. Once solemnised in terms of the provisions of these Acts, Muslim marriages are valid, but in order for this to occur such marriages must be monogamous. Since the abolition of apartheid and the introduction of our first democratic interim⁴ Constitution some 20 years ago, the secular courts and the legislature have increasingly recognised some of the legal consequences of civil marriages in the context of purely religious Muslim marriages regardless of their polygynous nature but without recognizing them as valid marriages. The current⁵ Constitution provides the basis for the legal recognition of marriages concluded under a system of religious family law,

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¹ Islam permits a Muslim husband to be married to up to four wives at the same time. See

N Moosa *Unveiling the Mind: The Legal Position of Women in Islam – A South African Context* 2 ed (2011) 37.

² Act 25 of 1961

³ Act 17 of 2006

⁴ Constitution of the Republic of South Africa, Act 200 of 1993 (the interim Constitution).

like Muslim Personal Law (MPL).⁶ As a result, the 2010 Muslim Marriages Bill (MMB),⁷ proposing to give formal statutory recognition to Muslim marriages, was published in the Government Gazette (GG). However, it remains uncertain whether, or when, the MMB will be promulgated as an Act of Parliament. Muslim women, who stand to benefit the most from its enactment into law, therefore continue to approach the courts, including the Constitutional Court, for relief when their religious marriages have been terminated by death or divorce.

The Constitutional Court has in fact interpreted the wording of several statutory provisions pertaining to intestate succession to extend to *de facto* monogamous religious marriages, in *Daniels v Campbell NO and Others*,⁸ and to *de facto* polygynous religious marriages, in *Hassam v Jacobs NO and Others*,⁹ without recognising such Muslim marriages as valid marriages. In this way, surviving widows of Muslim marriages are allowed to inherit from the deceased estate of their husband when he has died without leaving a will (ie intestate). The judiciary is to be commended for this and for having already addressed some practical hardships that required attention, for example, those pertaining to the status and maintenance of vulnerable wives and children. It is not feasible to do this on a case-by-case basis since it is a very expensive, cumbersome and complex exercise to enforce obligations arising from Muslim marriages through the courts. However, pending redress through formal recognition by the legislature, women and children, the innocent victims of the social and psychological effects of polygynous marriages and divorces, usually have little option but to do so.

Given the current status of the Constitutional Court judgment in *Hassam v Jacobs* as the latest landmark decision on MPL in South Africa, this article contends that the decision of the Cape Provincial Division of the High Court¹⁰ (now the Western Cape High Court) in that case may be criticised for misapplying the Islamic law (*Shari'a*)¹¹ which regulates matters of MPL, particularly its provisions pertaining to the form of judicial divorce known as '*faskh*'. The misapplication also extends to both inheritance and maintenance. The outcome of both judgments has been analysed in detail in several local articles. The confusion regarding the nature of a *faskh* in the High Court's judgment is also evident in the different opinions expressed on the matter in two¹² of these local publications and is elaborated upon in section VI (3). The Islamic law aspect is clarified in this article in

⁵ Section 15(3)(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution).

⁶ MPL refers to religion-based family law which covers a gamut of areas pertaining to, among others, marriage, polygyny, divorce, maintenance, custody (care), guardianship and succession. See Moosa (n 1) 10.

⁷ See GN 37 GG 33946 of 21 January 2011. It is available at http://www.justice.gov.za/legislation/bills/2010_muslim-marriages-bill.pdf. The MMB of 2010 is an amended version of the 2003 Muslim Marriages Bill and the latest of three published versions. The 2001 and 2003 Draft Bills are available at http://www.justice.gov.za/salrc/reports/r_prj59_2003jul.pdf (all accessed on 30 July 2013). See Moosa (n 1) 143–162.

⁸ 2004 (5) SA331 (CC).

⁹ 2009 (5) SA572 (CC).

¹⁰ 2008 4 All SA350 (C).

¹¹ Islamic law (*Shari'a*) is derived from and based on basic prescriptions established in the two seventh century primary sources of Islam, namely, the *Qur'an* (holy book revealed to Prophet Muhammad) and *Sunna* (*Hadith* or traditions of Muhammad based on the *Qur'an*). *Shari'a* rules were essentially developed in the eighth century by four jurists who were the founders of the following four *Sunni madhhabs* (schools or versions of interpretation of law): *Hanafi*, *Maliki*, *Shafi'i* and *Hanbali*. See Moosa (n 1) 10, 30, 56 and 82.

¹² See P Bakker 'Toepassing van Islamitiese reg in Suid-Afrika – *Hassam v Jacobs* [2008] 4 All SA 350 (C)' (2008) 29 *Obiter* 533 and M Osman-Hyder 'The impact and consequences of *Hassam v Jacobs NO* on polygynous Muslim marriages [A discussion of *Hassam v Jacobs NO* 2009 11 BCLR 1148 (CC)]' (2011) 22 *Stellenbosch LR* 233.

conjunction with the process followed in the Western Cape based quasi-judicial religious tribunal, the Muslim Judicial Council (MJC), which granted the *faskh*.

Although the courts may have given judicial recognition to some of the consequences of civil marriages in the context of Muslim marriages, they maintain that it is the role of the legislature to change the *status quo* and recognise Muslim marriages as valid. This article will highlight, through an analysis of *Hassam v Jacobs* in constitutional, legislative, judicial and Islamic law contexts, that the judgment can be both commended and criticised. Although long overdue and welcomed as ultimately beneficial and even lauded as progressive by Muslim religious authorities, including the MJC,¹³ it is contended that the application of the Islamic law of divorce in this case was flawed. In terms of a correct application of Islamic law, the facts of the case ultimately only involved a monogamous marriage, as in *Daniels v Campbell*, and not a polygynous marriage for which the judgment was lauded. Its outcome with regard to polygynous marriages was contrived because of the clear deviation from Islamic law, and the judiciary was the wrong vehicle to use to achieve such an outcome. It is contended that the legislature, through the enactment of the MMB as the Muslim Marriages Act (MMA), is the more appropriate vehicle to bestow full legal recognition on Muslim marriages. This article motivates that not only is such recognition necessary but that, had the MMB been enacted as the MMA at the time that *Hassam v Jacobs* was decided, the High Court would not have committed such an error because the MMB clearly regulates a *faskh* as an irrevocable form of divorce, that is, one that terminates a Muslim marriage. However, it is further contended that while formal statutory recognition will require that judicial officers, including Muslim and non-Muslim judges, adjudicate Muslim divorces in secular courts and engage with the MMA through the interpretation and application of its provisions, they will not be able to resolve interpretational complexities optimally without the assistance of local Muslim religious scholars (*ulama*, singular *alim*)¹⁴ and experts because the MMB does not spell out the provisions of Islamic law which regulate matters of MPL. Section III highlights some of the reasons why the MMB, an essentially *Shari'a* compliant code that is partly based on existing progressive interpretations of MPL, will be able to withstand constitutional scrutiny if challenged. Section VI (I) highlights that the regulation of a *faskh* in the MMB accords with divorce rules as they are currently understood and implemented in practice in the Muslim world. The MMB, while retaining the role of *ulama* as accredited marriage officers and mediators in the application of Islamic law, has reduced the roles previously envisaged for them in the 2003 MMB as accredited mediators, arbitrators, marriage officers and assessors.

However, while the dissatisfaction of some *ulama* may understandably be a major factor contributing to the current delay in recognition, the MMB does not preclude parties from presenting evidence by such *Shari'a* expert witnesses to guide the court, especially in the complex area of divorce, as has been the case in the past, in, for instance, *Ryland v Edros*,¹⁵ and still is the case. While the focus is on the Western Cape and the MJC, there are other informally constituted religious tribunals or competent bodies located at various

¹³ S Naidoo ‘Marriage ruling for Muslim women hailed’ 18 July 2009, available at <http://www.kin.co.uk/news/86.html> (accessed on 18 August 2013).

¹⁴ In this article, *ulama* are variously referred to as ‘imam’, ‘sheikh’, ‘moulana’ or ‘mufti’.

¹⁵ 1997 (2) SA690 (C).

places in the provinces of South Africa that are presided over by religious scholars with varying degrees of status depending on their formal training and qualifications.¹⁶ The scholars' interpretations and rulings on divorce usually, but not necessarily, accord with the jurisprudential rules of the school of Islamic law that dominates in the particular tribunal, and may therefore vary. As a member of national *ulama* umbrella bodies, the MJC may sometimes have to review decisions pertaining to the *faskhs* granted by the tribunals of other provinces. While we assume that the MJC may deal with such matters on a case-by-case basis, as and when it has to deal with them, we also assume that it would only recognise the decisions of tribunals associated with it. We maintain that the participation of the MJC in *Hassam v Jacobs* would have led to a different outcome. *Moulana Yusuf Keraan*, a senior *alim* and long-standing member of the MJC, and *Sheikh Abdul Kariem Toffar*, also a senior *alim* based in Cape Town, have confirmed that our understanding of a *faskh*, and therefore the definition in the MMB, elaborated upon in section VI, accord with the internationally accepted norms and best practice. We do, however, concede that while it would not have been impossible with the guidance of a code like the MMA, it would nevertheless have been difficult for a court seeking clarity on the jurisprudential rules of MPL to determine the correct position even with the active participation of Muslim clergy or academics, because their opinions may vary. Since our views may differ from those held by some *ulama* and academics, we hold ourselves accountable for any controversial opinions or inaccuracies in this regard.

The decision in *Hassam v Jacobs* also highlights why it is of critical importance for Muslims who wish to regulate their entire estates in terms of the provisions of Islamic law only, to execute valid and enforceable wills. As will be further explained in section II, the reason for this is that Islamic law rules are only partly based on testamentary succession and are mainly based on default, compulsory rules regulating the rest of the estate in terms of 'intestate' succession, as it is understood in a secular context. While a civil marriage is generally not regarded as a contract¹⁷ and is by default deemed to be in community of property (COP), marriage is essentially a contract in terms of Islamic law¹⁸ and is by default deemed to be out of COP and without a system of accrual. To encapsulate the Islamic position, Muslim parties have to mutually and expressly regulate their affairs in an antenuptial contract (ANC). The *Hassam v Jacobs* decision, therefore, further highlights that while Muslim women may be aware that they are entering potentially polygynous marriages and of their default nature, they may not currently be familiar with the adequate religious protection available to them in the form of a marriage contract.

Although the court in *Ryland v Edros*¹⁹ innovatively enforced parts of a Muslim marriage contract, it did not do so on the basis of an explicit contract of marriage but instead relied on terms implied by Islamic law in such a contract. The reason for this was that such an instrument is not optimally utilised by local Muslims and is not adequately encouraged by *ulama*. Instead of parties drafting full-scale contracts, most *ulama* issue a very basic or

¹⁶ For a discussion of the number of such bodies, the history of their formation at national and regional levels, their religious orientations, their divided role in the recognition of MPL, and the fractures that exist within them that continue to divide them and delay recognition, see Moosa (n 1) 143–162.

¹⁷ See J Heaton *South African Family Law* 3 ed (2010) 15.

¹⁸ See N Moosa *Comparative Study of the South African and Islamic Law of Succession and Matrimonial Property with Special Attention to the Implications for the Muslim Woman* (unpublished LLM thesis, University of the Western Cape, 1991) 24–25.

¹⁹ See n 15.

standard marriage certificate that often only contains a brief reference to the obligatory dower (*mahr*)²⁰ which is a consideration that a wife is entitled to receive from her husband in order for the contract of marriage to be valid. Although it may be a powerful economic tool and any unpaid dower a debt which she may claim from his estate in the event of the death of, or divorce by, her husband, rather than encouraging the prospective bride to request a dower of considerable value and to defer payment thereof to a later stage, if the future husband does not at the time have the means to make the payment, the bride is often encouraged to ask for a minimal amount merely as a symbolic token. Little regard is given to a myriad of other types of obligations that may potentially also protect her and be enforceable through such a contract.

II Clarifying the context

According to the reported facts of *Hassam v Jacobs*, Mr Ebrahim Hassam²¹ (the deceased) was married to two wives. Fatima Hassam (the applicant) was the first wife and Mariam (the third respondent) was the second wife. However, in the ‘larger-than-life’ story of Mr Hassam, he was married to three women in the following sequence: Wasielah in 1966, Fatima in 1972, and Mariam in 2000. He fathered a total of ten children: three (a son and two daughters) by Wasielah, four (all daughters) by Fatima, and three (two sons born before the marriage and a daughter thereafter) by Mariam. Wasielah, the first wife, successfully obtained a *faskh* during 1976/1977 and hence was lawfully, in terms of Islamic law, divorced from the deceased.

The positive outcome of both the High Court and Constitutional Court judgments generated much publicity for Fatima locally and abroad. Mr Hassam’s first wife, Wasielah (now deceased), and her three children remain the unsung heroes of the Hassam saga. Wasielah, who was still alive at the time of the High Court judgment in 2008, apparently did not begrudge Fatima the positive outcome in her favour even though Wasielah’s own children were denied their religious and legal entitlement to an inheritance. In South Africa nothing precludes a testator or testatrix from making a will devolving his or her entire estate according to the Islamic law of succession. However, he or she is deemed not to have ‘complete’ freedom of testation because Islam only allows a deceased to voluntarily dispose of part (one third) of the estate by a will,²² while the rest (two thirds) devolves automatically and compulsorily in shares prescribed by the *Qur'an*²³ to heirs who are determined at the time of the death. Communication from Wasielah’s daughters, one of whom is an attorney, allowed us to collate additional information that was required to reconstruct the gaps evident in the published facts of the High Court case (detailed in section V) and when dealing with the nature of a *faskh* and the process followed by the MJC (in section VI). The gaps in the story were created because details and evidence of the *faskh* were not sought by the judge from members of the MJC as expert witnesses, nor were they provided by either the applicant or the respondents. Information was also

²⁰ In terms of clause 1 of the MMB ‘“dower” (*mahr*) means the money, property or anything of value, including benefits which must be payable by the husband to the wife as an *ex lege* consequence of the marriage itself in order to establish a family and lay the foundations for affection and companionship’ and ‘“deferred dower” means the dower or part thereof which is payable on an agreed future date but which, in any event, becomes due and payable upon the dissolution of a marriage by divorce or death’.

²¹ While the surname ‘Hassam’ is variously spelled in the cases and sources as ‘Hassan’ and ‘Hassen’, ‘Gabi’ as ‘Gaibie’, and ‘Mariam’ as ‘Miriam’, for the sake of convenience ‘Hassam’, ‘Gabie’ and ‘Maria’ are used in this article.

²² See Q.2:180–182, 2:240 and 5:105–106. The first number in the citation refers to the *Qur'anic* chapter (*surah*) and the second number indicates the verse or verses (*ayat*).

²³ See Q.4:7, 4:11–12 and 4:176.

gleaned from pre-existing internet news reports and interviews with the applicant, Fatima, which were accessed using her maiden surname, Gabie. We owe a debt of gratitude to *Moulana Y Keraan*²⁴ for informally confirming that the MJC had granted a *faskh* to both Wasielah and Fatima.

In South African secular law, a divorce is understood to mean the immediate and complete dissolution of a civil marriage by a decree of divorce granted by a secular court on specified grounds on the initiative of either the husband or the wife and involves both of them. The position in terms of Islamic law is very different. The general rule is that a husband has a unilateral right to *talaq*²⁵ (divorce) his wife or wives. His right is unfettered, unqualified and not reciprocal. A husband may himself terminate the contract of marriage informally by issuing the *talaq* to his wife and may, without affecting its validity, do so independently of her or the participation of a court. *Atalaq* may have variable revocable (suspends the marriage) or irrevocable (*de facto* terminates the marriage) consequences. If the marriage is suspended, it still subsists fully and may not terminate at all if the husband changes his mind and reconciles with his wife. In most Muslim countries a *talaq* (by the husband or a court) and a *faskh* are legally finalised in Islamic (*Shari'a*) courts constituted by religious judges who are usually solely responsible for adjudicating MPL issues. In the South African context such courts would include the quasi-judicial religious tribunals referred to in section I.

III The case in constitutional, legislative and judicial contexts

According to the facts gleaned from the High Court judgment, Fatima Hassam (the applicant) and the deceased were married to each other in accordance with Muslim rites only. She was his first wife but not his only wife because he was also married to a second wife, Mariam Hassam (third respondent), also only according to Muslim rites. Such marriages are by default deemed to be out of COP and without a system of accrual. As a result, when both marriages were terminated by Mr Hassam's death, each widow was left without a half share in a joint estate to fall back on. In addition, Mr Hassam had died intestate. The facts of the case also reveal that the deceased's family did not want to give effect to an agreement reached regarding the division of his estate, thus leaving Mariam, who had three minor children at the time to maintain, to procure the appointment of Mr Jacobs (first respondent) as the executor of the estate. She did so with the aid of a non-governmental organisation, the Women's Legal Centre Trust (WLCT). However, subsequent to his appointment, the executor did not deem Fatima (the applicant) to be Mr Hassam's spouse for purposes of the Intestate Succession Act (ISA)²⁶ and the Maintenance of Surviving Spouses Act (MSSA)²⁷ and rejected her claims to inherit and to receive maintenance from the deceased estate. Jacobs believed that the applicant's marriage had already been terminated by divorce (*faskh*) prior to the deceased's death.

In addition, he maintained that even if it had continued until the deceased's death and had been terminated by it, it was polygynous in nature and hence excluded the applicant

²⁴ Communication from *Moulana Y Keraan* about the case and the process followed by the MJC is referred to in this article.

²⁵ '*Talaq*' literally means 'to set free' in Arabic. For the sake of simplicity, we have not followed any of the various systems of Arabic transliteration, for example, '*tala-q'*, pronounced '*talaaq*', becomes '*talaq*'.

²⁶ Act 81 of 1987.

²⁷ Act 27 of 1990.

from the ISA and MSSA which were applicable only to monogamous marriages. The applicant challenged the executor's decision in the High Court. Although the case was first instituted in April 2004, the judgment was only handed down four years later on 18 July 2008. In a watershed judgment, the High Court, per Van Reenen J, extended the application of the ISA and the MSSA to spouses in *de facto* polygynous Muslim marriages. Van Reenen J held that the word 'survivor' in the MSSA can be applied to more than one surviving spouse without unduly straining the language of the Act. He accordingly concluded that the MSSA applies to *de facto* monogamous and polygynous Muslim marriages. He further found that, with the exception of s 1(4) (f), the provisions of the ISA could also easily be applied to spouses in *de facto* polygynous marriages. In respect of the use of the word 'spouse' in s 1(4) (f), Van Reenen J found that the section clearly contemplated only one spouse. He found that the exclusion of surviving spouses of a *de facto* polygynous marriage was inconsistent with the Constitution, and he made a reading-in order that reframed the section.²⁸ This order was referred to the Constitutional Court where it was confirmed a year later, on 15 July 2009, with retroactive effect from 27 April 1994 (coinciding with the date that the interim Constitution came into effect). The Constitutional Court held that the exclusion of widows of *de facto* polygynous marriages from the ambit of the ISA amounted to unjustifiable and unfair discrimination on the grounds of gender, religion and marital status.²⁹ As a result of the court's order, each Muslim spouse in a polygynous marriage qualifies as a 'spouse' and a 'survivor' in terms of the ISA. This finding intimated that, as in *Daniels v Campbell*, the ultimate distribution of the estate would not be in accordance with Islamic law but in accordance with South African law. This is not surprising because the MMB does not intend to encompass all jurisprudence pertaining to MPL and specifically does not regulate intestate succession and the maintenance of widows according to Islamic law, but proposes that they be regulated by South African law because of the potential conflict of MPL with the Constitution.

The MMB makes provision for amendments to current legislation, such as the ISA and the MSSA, to include Muslim spouses.³⁰ The Constitution expressly permits personal or family law to be governed by religious law,³¹ and since it therefore affords such religious law, if recognised, constitutional protection, a court cannot deem a religious law's discriminatory provisions as inherently in violation of the Constitution's freedom of religion clause.³² However, a court can rely on the provisions in the Constitution that MPL must be consistent with the Constitution and its Bill of Rights,³³ especially the provisions relating to equality³⁴ and human dignity.³⁵ Inheritance is therefore not formally regulated by the MMB because it is an area where the *Qur'an* clearly discriminates between the sexes. It not only prescribes that the male heir inherits double the share given to females

²⁸ See *Hassam v Jacobs* (n 10) paras 21 and 23.

²⁹ See *Hassam v Jacobs* (n 9) paras 37, 48–49 and 53 and n 4.

³⁰ Clause 17 of the MMB, read together with its Schedule, calls for the amendment of s 1 of the ISA to include a Muslim spouse in the definition of 'spouse', and further 'that in the event of a deceased man being survived by more than one spouse, the following applies—(i) for the purposes of subsection (1)(a), the surviving spouse or spouses inherit the intestate estate in equal shares' (my emphasis in italics). It also calls for the amendment of s 1 of the MSSA to include a Muslim surviving spouse in the definition of 'survivor'.

³¹ Section 15(3)(a). See n 5.

³² Section 15(1).

³³ Section 15(3)(b) and s 39(3) (interpretation clause).

³⁴ Section 9.

³⁵ Section 10.

but also that husbands inherit a greater share of their wives' property than do wives of that of their husbands.³⁶ Given freedom of testation in South Africa and constitutional guarantees of equality, Muslims who find the application of the South African law of intestate succession problematic are expected to privately regulate their affairs by ensuring that they execute valid wills.

The Constitutional Court also held³⁷ that the objective of the ISA, namely, to decrease spouses' dependence on family benevolence, is thwarted by the exclusion of Muslim spouses from its ambit. This finding is to be welcomed. Divorcees are deemed, in terms of Islamic law, to be entitled to maintenance for a limited period only, which is usually linked to a *Qur'anic* waiting period (*idda*)³⁸ following divorce. However, widows who also undergo a waiting period following the death of a spouse are deemed not to be entitled to any maintenance at all, neither during nor after *idda*, because such right has been interpreted to be inextricably linked to their right to inherit from their husband.

Therefore, if in need of support, it is expected of widows to either maintain themselves or to turn to their own families.

The Constitutional Court found that the word 'spouse' in s 1 of the ISA cannot in its ordinary sense refer to more than one spouse, and therefore it could not adopt the same approach that it did in *Daniels v Campbell*. It found that s 1 was unconstitutional and it 'cured' or remedied the unconstitutionality by reading in the words 'or spouses' after each use of the word 'spouse' in the section.³⁹ Given that in the context of a polygynous marriage, child shares will be calculated differently, the Constitutional Court also indicated how a child's share must be calculated and how an intestate estate should devolve if the deceased was survived by more than one spouse:

- (a) a child's share in relation to the intestate estate of the deceased shall be calculated by dividing the monetary value of the estate by a number equal to the number of the children of the deceased who have either survived or predeceased such deceased person but are survived by their descendants, plus the number of spouses who have survived such deceased;
- (b) subject to para (c), each surviving spouse shall inherit a child's share of the intestate estate or so much of the intestate estate as does not exceed in value the amount [currently R125 000] fixed from time to time by the Minister for Justice and Constitutional Development by notice in the *Gazette*, whichever is the greater; and
- (c) where the assets in the estate are not sufficient to provide each spouse with the amount fixed by the Minister, the estate shall be equally divided amongst the surviving spouses.⁴⁰

³⁶ See Moosa (n 18) 135.

³⁷ See *Hassam v Jacobs* (n 9) paras 30, 34 and 37–38.

³⁸ Clause 1 of the MMB defines *idda* as 'the mandatory waiting period arising from the dissolution of the marriage by *Tala-q*, *Faskh* or death during which period the wife *may not remarry*' (emphasis added).

³⁹ See *Hassam v Jacobs* (n 9) para 57.

⁴⁰ See *Hassam v Jacobs* (n 9) para 57.

Since such shares are both equal and undivided, the division is much more generous than that which multiple widows in a polygynous marriage would have been entitled to in terms of Islamic law.

In *Daniels v Campbell* the Constitutional Court held⁴¹ that the words ‘spouse’ in the ISA and survivor’ in the MSSA include the surviving spouse in a *de facto* monogamous Muslim marriage. The Constitutional Court in *Hassam v Jacobs* did not deal with the MSSA because the matter was not before it. Heaton⁴² explains that while this may be so, the Constitutional Court did not raise any objections to Van Reenen J’s interpretation of the MSSA, in the High Court, as extending to spouses in *de facto* polygynous Muslim marriages. She further explains that although Van Reenen J’s interpretation may only reflect the position in the Western Cape, it is highly unlikely that another division of the High Court would disagree with this interpretation when dealing with other religious marriages (eg Hindu⁴³ and Jewish marriages), which are also not formally recognised, as well as fully recognised African customary marriages.⁴⁴

IV Relevant facts of the case⁴⁵

The applicant and the deceased had entered into their Muslim marriage in December 1972. Some 18 years later, in February 1990, the deceased purchased from the Cape Town City Council a property situated in a sub-economic area known as the Cape Flats. This property served as the matrimonial home of the applicant, the deceased and their children, all of whom had, at the time of the judgment of the High Court in July 2008, reached the age of majority. The applicant had effected physical improvements to this property at her own expense although she did not pursue an earlier claim (rejected on the ground of prescription) for their value in these proceedings. In June 1998, after 26 years of marriage, the applicant:

[O]btained a ‘faskh’ which would have brought about a termination of the marriage upon completion of ‘Iddah’ ie a separation period of three months.

The applicant avers that the ‘faskh’ became ineffectual because the deceased rejected it by tearing up the document evidencing it when presented to him and that she and the deceased became reconciled . . . during the waiting period [idda] [which would have expired in September of the same year]. . . .

The[y] . . . continued to live together as husband and wife until his death [i]n . . . August 2001 save for a period after his marriage during 2000 to M[a]riam. . . . The [executor] . . . questions whether the marriage between the applicant and the deceased was extant at the time of the latter’s death [but] . . . failed to provide any evidence in refutation of any of the facts on which the applicant based her contention that the marriage had not come to an end. The veracity of such factual averments [has] not been placed in issue by any of the other respondents. The failure to have done so is unsurprising as it is unlikely that the circumstances surrounding the deceased’s rejection of the ‘faskh’ would have manifested

⁴¹ See *Daniels v Campbell* (n 8) para 37.

⁴² See Heaton (n 17) 223.

⁴³ Following the decision in *Daniels v Campbell* (n 8), and referring to *Hassam v Jacobs* (n 10), the Durban High Court in *Govender v Ragavayah NO and Others* 2009 (3) SA 178 (D) also recognised a monogamous Hindu marriage for purposes of the ISA. In this case Moosa AJ declared the word ‘spouse’ in the ISA to include the surviving partner of such a marriage.

⁴⁴ See Heaton (n 17) 233.

⁴⁵ See *Hassam v Jacobs* (n 10) paras 2–4 and 7.

themselves publicly. . . . The applicant's version as regards the non-adherence to the waiting period and its consequences is not only free of internal contradictions and inconsistencies but, furthermore, there is nothing to even suggest that it is improbable. Caution, if required, is generally met by the presence of features that engender confidence in the trustworthiness of evidence. . . . The applicant[']s concerns about possibly jeopardising the interests of the third respondent and her minor children by having tailored the relief originally sought by her so as to obviate doing so . . . [go] a long way towards engendering belief in the trustworthiness of her evidence. . . . [T]he applicant has succeeded in proving, on a balance of probabilities, that her marriage to the deceased was extant as at the time of his death.⁴⁶

According to the summarised facts in the Constitutional Court case, Mr Hassam married Mariam during 2000 'without the applicant's knowledge or consent.'⁴⁷ While the MMB proposes to regulate the future practice of polygyny in South Africa, in terms of Islamic law absence of knowledge or consent are of no consequence to the validity of Mr Hassam's marriage to Mariam. The deceased fathered three minor children born to Mariam: two were born prior to their marriage and one subsequent to it. He died shortly thereafter in August 2001.

V Piecing the puzzle together

In reconstructing Mr Hassam's life, it is evident that when he married Fatima (the applicant) in December 1972, his marriage to Wasielah (in February 1966) had already been in existence for six years. Four years later, in 1976/1977, Wasielah obtained a *faskh* from the MJC on the grounds of physical desertion and non-maintenance of her and their three minor children. The MJC granted Wasielah her *faskh*. Polygyny is permitted in Islam and is therefore, in and of itself, not considered to be a valid ground on which to base a *faskh*. However, having obtained the *faskh*, it nonetheless also terminated the polygynous nature of their marriage. Wasielah subsequently remarried. Whilst married to Fatima, the deceased had an extra-marital affair with Magdelena, the young domestic worker in their employ, who, as the facts of the case confirm, bore him two illegitimate sons,⁴⁸ born in 1994 and 1996. The deceased housed Magdelena and their children in a separate property that he owned. This affair, it appears, could have contributed to the reasons why Fatima had successfully applied for a *faskh* from the MJC in June 1998. *Moulana* Keraan confirmed⁴⁹ that when the *faskh* was granted, it terminated the marriage immediately and irrevocably, and that it had been granted in the absence of the deceased. It would appear that the deceased and the applicant continued to live together as husband and wife. Fatima informed the court that when she showed the deceased the *faskh* papers, he destroyed them. It would appear that he was under the impression that living together with Fatima as her husband would nullify the *faskh*, as it would in the case of a revocable *talaq*.

⁴⁶ See *Hassam v Jacobs* (n 10) paras 2, 5, 7 and 8.

⁴⁷ See *Hassam v Jacobs* (n 9) para 3.

⁴⁸ V Pillay 'Codify Muslim law' News24 July 2009, available at <http://m.news24.com/news24/SouthAfrica/News/Codify-Muslim-law-20090716> (accessed on 17 August 2013).

⁴⁹ See n 24.

However, when, in 1999/2000, it was brought to *Moulana* Keraan's attention quite fortuitously by the deceased's eldest son, who had come to consult him on a private matter, that the deceased might either not have been aware that a *faskh* had been issued or of the Islamic law consequences of a *faskh* as an irrevocable divorce, he sought to rectify this. *Moulana* Keraan did this by arranging a private meeting with the deceased in the presence of his son, where he brought the *faskh* to his attention, furnished him with a copy of the *faskh* certificate and explained the Islamic law consequences of such a divorce to him. Subsequent to that meeting, the deceased moved out of the common matrimonial home he shared with Fatima and their daughters. In February 2000, the deceased, at the age of 58, married Magdelena according to Muslim rites. She became Muslim and changed her name to 'Mariam'. The deceased relocated with her to another property which he co-owned with his brother. Their third child, a daughter, was born in wedlock in April 2001. The deceased unexpectedly died of a heart attack in August 2001. If one accepts that the *faskh* granted to Fatima was an effective divorce, then the deceased was not in a polygynous Muslim marriage when he died.

Fatima was understandably seriously aggrieved by the situation. Mariam's maintenance claim for her three minor children against the deceased estate would have meant the sale of Fatima's matrimonial home, which also formed part of the estate, in order to pay the maintenance claim. In addition to losing her home, she suffered the additional loss of the improvements she had made to it, the claim for which, according to the facts of the case, had prescribed.

The final distribution of the deceased's estate in terms of the ISA ultimately benefited Mariam, her three minor children and Fatima. A very different distribution would have occurred if Islamic intestate succession law had applied. The general rule is that spouses may not inherit from one another if one of them dies after an irrevocable divorce. Moreover, only legitimate heirs are entitled to inherit. In terms of such distribution, Fatima (given her *faskh*) and the two youngest sons (by Mariam) of the deceased (given their illegitimacy) would have been excluded. All of Fatima's and Wasielah's children would have been included, with the eldest son (by Wasielah), as the only legitimate son, inheriting double the share of his two sisters and five stepsisters. Although the issue of illegitimacy was not brought up in this case, the general position in terms of South African law is that such children, now labelled as children born of unmarried parents, are regarded as children born of married parents if their parents subsequently married each other at any time after their birth.

This would include children born of a polygynous Muslim marriage. There is also no difference in the succession rights of children of married or unmarried parents. They can inherit intestate from both parents and *vice versa* and both parents may benefit such children in a will.⁵⁰

⁵⁰ For the South African position regarding the legitimation of illegitimate children through subsequent marriage see s 38(1) of the Children's Act 38 of 2005. In terms of s 1(1) of this Act 'marriage' is broadly defined to include Muslim (and therefore polygynous) marriages. Section 1(2) of the ISA provides that children born of unmarried parents (the section refers to 'illegitimacy') are not precluded from inheriting intestate from a blood relation. In terms of s 2D (1) (b) of the Wills Act 7 of 1953, the reference to children in a will would, for the purpose of its interpretation, include children born of unmarried parents (the section uses the phrase 'born out of wedlock').

The general rule in terms of Islamic law is that children born as a result of an extra-marital sexual relationship (*zina*) are deemed to be illegitimate.

They cannot be legitimised and are generally not recognised as belonging to the father. Hence, neither the father nor the child may automatically inherit from one another when one of them dies intestate. Illegitimate children are, however, entitled to inherit from their mother and *vice versa*.

In terms of Islamic law the minimum period of pregnancy is six months. Therefore if a woman gives birth to a child within six months of her marriage, the child is deemed to be illegitimate and is not considered to belong to her husband. According to the *Hanafi* school of law a husband may acknowledge such a child as his own. However, if he acknowledges paternity he is deemed to be merely acknowledging existing legitimacy and not conferring legitimacy on an illegitimate child. Such a child is legitimate and entitled to inherit from him. In this case, although there is an already-existing marriage, the marriage alone is not enough to confer legitimacy. The father has to expressly acknowledge paternity of the child since the mother may have had an affair with someone else prior to their marriage, become pregnant and the child could have been the product of that relationship.

This is a complicated issue and raises questions which require further investigation. For example, would such an acknowledgment also be deemed to be valid if no marriage had occurred or if they had married after the birth? The deceased in *Hassam v Jacobs* was a follower of the *Shafi'i* school. The jurists of this school and the remaining two (*Maliki* and *Hanbali*) of the four schools of law are of the opinion that illegitimate children do not inherit from their father.⁵¹ The deceased and Mariam married each other in 2000. This was several years after the birth of their two illegitimate sons in 1994 and 1996. While the deceased's illegitimate children may for this reason not have been entitled to inherit from him through intestacy, Islamic law does make it possible for a father to execute a will to enable such children to inherit. Given the financial implications of the (reserved) maintenance claim of Mariam for her minor children against the estate, it was futile for Wasielah's children to pursue a claim for their inheritance in terms of the ISA. The case's final outcome deemed the applicant to be a wife in a polygynous marriage and allowed her to inherit in terms of the ISA. In the end, while this outcome may have signalled a personal victory for the applicant, her actual share in terms of the ISA was negligible and her matrimonial home had to be sold.

VI *Faskh* in islamic law and the MJC process

Since the *faskh*, and its unorthodox treatment as revocable by the High Court, formed a focal point of the case, this section briefly examines the nature of the *faskh* as one of the limited number of forms of divorce available to a wife, its consequences, and the grounds on which an application therefor may be based. The MJC, established in 1945, is the oldest and most highly regarded tribunal in the Western Cape. Since the MJC granted *faskhs* to both Wasielah and Fatima (the applicant), the process followed by the MJC is

⁵¹ For the Islamic law position regarding the succession rights of *de facto* divorced wives and illegitimate children see A Hussain *The Isla^mic Law of Succession* (2005) 176, 250–252 and 379. See n 11 and n 82.

briefly looked at in this section to help to determine: whether the implications of such a divorce were sufficiently and clearly spelled out to the applicant; whether it was possible that the deceased may have been unaware of the *faskh* or of its nature by regarding it as similar to a *talaq* in the local community; whether the implications of his rejection of the *faskh* by destroying the document were of any relevance; and whether the novel interpretation adopted by the court that the deceased and the applicant could reconcile during her *idda* following the *faskh* was contrary to local and international Islamic law norms. The different academic views referred to in section I are also elaborated upon. Although this section is subdivided through the use of subheadings, some overlap occurs between the subsections.

(1) Faskh as the licence to re-marry in terms of Islamic law and the MMB

Although not clearly stated in the primary sources of Islam, the *faskh* is deemed to have its initial basis in both the *Qur'an*⁵² and *Sunna*⁵³ and is accepted as a form of divorce. Since the apparent closing of the doors to independent interpretation (*ijtihad*) and the application of the primary sources by *Sunni* jurists in the tenth century, Islamic law (*Shari'a*) has been through a process of reform, re-interpretation (starting in the late 19th century), and codification (until the late 20th century) in its application by modern legal structures in the Muslim world.⁵⁴ Since a Muslim husband already had access to *talaq* to end a marriage, divorce was acknowledged as an area of discrimination against women.

The introduction of the *faskh* enabled wives to access divorce and thereby to divorce themselves from their husbands. As indicated above, the four schools of law in essence represent four schools of interpretation.⁵⁵ Cognisant, too, of the variation in juristic opinion in these four schools regarding some of the grounds for a *faskh*, and therefore its application, the limited and stringent grounds were radically expanded for the benefit of women.

As will be detailed below, this is also evident in the MMB in its treatment of, and list of the grounds for, divorce, which are not limited to any particular school but have been adopted for justifiable reasons.

For example, the restrictive *Hanafi* law regarding divorce makes it virtually impossible for a wife to get out of a marriage since it permits her to obtain a judicial divorce (*faskh*) only on certain specific grounds, for example, impotence. The *Maliki* law, on the other hand, quite liberally allows her to obtain a divorce on various grounds, including cruelty, desertion, and failure to maintain.

In secular law, a divorce presupposes a valid marriage whereas an annulled marriage is null and void *ab initio* and therefore does not need to be dissolved. In contrast, '*faskh*' is understood in terms of Islamic law to occur when a court terminates a marriage that is

⁵² In Q.4:35 a general reference is made to the appointment of arbitrators although this has also been translated to mean mediators. See n 11 and n 80.

⁵³ The general principle contained in the following authentic *hadith* (tradition) attributed to Muhammad states: 'la darar wa la dirar', which roughly translated means 'don't injure or harm and don't reciprocate injury or harm'. This *hadith* (number 32) is available at http://www.40hadith.com/40hadith_en.htm (accessed on 17 August 2013). See n 11.

⁵⁴ See in general Moosa (n 1) 68–69 and 74.

⁵⁵ See n 11.

invalid either from the outset (eg annulment on the ground of impotence) or as regards its further continuation (eg divorce on grounds that are becoming increasingly common in the Western Cape, namely, adultery and drug, alcohol and physical abuse).⁵⁶ Referring to a *faskh* as including annulment may give rise to much confusion, because in South Africa '*faskh*' is popularly used to denote a regular judicial divorce or a final dissolution of a marriage. However, it is not uncommon for the terms '*faskh*' and 'annulment' to be used interchangeably, even by the MJC itself, only to mean or refer to a *faskh* as it is popularly understood. The MMB accurately defines '*faskh*' as 'a decree of dissolution of a marriage granted by a [secular] court, upon the application of a husband or wife, on any ground or basis permitted by Islamic law . . .'.⁵⁷ It further provides that when a court grants such a decree of divorce, it 'has the effect of terminating the marriage, in accordance with Islamic law.'⁵⁸

There are rigours associated with a *faskh*, and a Muslim husband, who has unencumbered access to *talaq*, may not have the need or desire to utilise a *faskh*. Nonetheless, Islamic law provides that the *faskh*, as a form of divorce, is available to both a husband and a wife, and, further, that such divorce may only be pursued on the basis of specific grounds, some of which pertain to the wife only and some to both spouses. Unlike the freedom associated with the *talaq* of the husband, each spouse must therefore have cogent reasons for utilising the *faskh*. These reasons range from the husband causing undue harm (*darar*) to the wife to what is secularly understood as the irretrievable breakdown of the marriage, namely *shiqaq*.⁵⁹ This is also the position in South Africa, although the MMB's list of grounds is not exhaustive. The MMB, in clause 1, lists some ten grounds for the granting of a *faskh* in its definition of a '*faskh*'.

A *faskh* dissolves the marriage immediately, and because it is always irrevocable, and not revocable, in effect, the orthodox position is that such a *de facto* divorced husband and wife are unable to 'reconcile' by returning to the former marriage. However, the *Qur'anic* waiting period (*idda*), which in most instances is three months, and which is observed only by the wife, is still mandatory for the ex-wife or divorcee in the case of both the irrevocable *talaq* and the *faskh* even though no reconciliation is possible during that period. However, in the case of a *faskh*, the parties, if both agree to it, may re-marry each other after the expiration of the *idda* period (but not during it). A new contract of marriage which includes a new dower (*mahr*)⁶⁰ is therefore a pre-requisite. Although such remarriage may, in terms of a strict application of Islamic law, only occur after the *idda*, it will be indicated below that the practice of the MJC is to allow it to take place during that waiting period. The MJC's practice may be aligned with its view that 'reconciliation' should be encouraged, and may even be welcomed by those who consider *idda* to be a discriminatory practice because it only applies to women, and who also highlight that one of its purposes, the right of the husband to ensure that the woman is

⁵⁶ See MYToefy *Divorce in the Muslim Community of the Western Cape: A Demographic Study of 600 Divorce Records at the Muslim Judicial Council and National Ulama Council [at the time also known as the Islamic Unity Convention (IUC)] between 1994 and 1999*, (unpublished MA dissertation, University of Cape Town, 2001) 103 and report by F Hendricks 'High fasakh rate in MP Voice of the Cape (VOC) 14 September 2012 available at <http://www.vocfm.co.za/index.php/news/mpl/item/6347-high-fasakh-rate-in-mp> (accessed on 15 August 2013).

⁵⁷ See clause 1 of the MMB.

⁵⁸ Clauses 9(5) (b) and (d) of the MMB.

⁵⁹ Literally means 'breaking it into two'. See n 81.

⁶⁰ See n 20 for the definition of *mahr*.

not pregnant with his child, can be fulfilled through medical testing. It is contended that these views, nonetheless, detract from the fact that there was a cogent reason why the *faskh* was granted in the first place, and which could not have suddenly disappeared.

Furthermore, the practice of the MJC defeats two other purposes of *idda*, namely, that it also serves as a barrier or restraint to discourage frequent divorce and remarriage, and that it grants the wife the time necessary to regain her emotional readiness to move on from a marriage that may have gone bad. The definition of *idda*⁶¹ in the MMB supports this view.

(2) The MJC procedure⁶²

Currently, it is only through utilising the *faskh* that a wife, in terms of Islamic law, can obtain a ‘proper’ or final divorce as it is understood in secular South African law. She may apply for, and obtain, such a decree of divorce from the MJC independently of her husband and without his consent. While the husband’s participation in the process followed by the MJC is encouraged by the tribunal, the procedure adopted by it confirms that it is not essential in order to bring the process to a conclusion.

It is acknowledged that the current MJC process may have improved substantially since the High Court judgment in *Hassam v Jacobs* and may have varied from the process that had applied in the MJC at the time that Fatima (the applicant) was granted a *faskh*. However, the essence of the process and its outcome remain the same. Because the husband has access to *talaq*, the wife is usually the applicant for a *faskh* and initiates the process. At a first or introductory session, the applicant states her claim and grounds for seeking a *faskh*. A first letter is sent to the husband informing him of the proceedings and inviting him to attend the second session. If there is no response, a second letter is sent.

An attempt is also made to speak to the husband directly through telephonic communication or, if he is not contactable, with members of his family. If this fails, an affidavit by the wife is also required to indicate that her husband has indeed gone ‘awol’. Understandably, the husband who does not wish to be divorced may be unco-operative and simply not attend scheduled appointments. While his refusal to co-operate may be deemed to be an ‘admission of guilt’, and while it is possible for the process to continue without him, it can also cause considerable delays. Sometimes the *faskh* may not be granted if the husband gives any indication of wanting to reconcile. It is a fact that *faskhs* are generally not easily granted to women by the MJC. Recent (2011) MJC statistics highlight that in respect of 97 applications, only 48 (about half the number) resulted in *faskhs* being granted!⁶³ However, the MJC acknowledges that it also experiences practical problems with its processes which may render its own decisions to not be watertight.

While the MJC may have tried all the above-mentioned steps to give the husband knowledge of the impending divorce, there have, for example, been cases where it later

⁶¹ See n 38 for this definition of *idda*.

⁶² Information regarding the process was derived from personal communications with Moulanas YKeraan, AF Carr and Sheikh F Emandien of the MJC and the summary in the earlier study of the MJC by Toefy (n 56) 15–16.

⁶³ See Muslim Judicial Council ‘2nd Quarter Summary’ available at

http://www.mjc.org.za/index.php?option=com_content&view=&id=373:2nd-quater summary&catid=61:sddarticles&Itemid=1 (accessed on 18 August 2013). See n 66.

transpired that the husband was unaware of the notice letters forwarded to him simply because they did not reach him even if sent to the address provided by the applicant. It therefore cannot just be assumed that he is in ‘contempt’ of the tribunal. In an additional attempt to locate the husband in order to bring the impending divorce to his attention, the MJC has recently (apparently since the beginning of 2013) started a system whereby notices are broadcast on local Muslim radio stations. This informal, non-legal practice may seriously impact on both the husband’s and the wife’s right to privacy and dignity. As regards the absence of a husband from divorce proceedings, South African law permits a divorce to be instituted by edictal citation.⁶⁴ The party has to obtain permission from the court to use an advert in newspapers as the form of service. While the concerns regarding privacy and dignity must also be relevant to edictal citation, it is a court-approved process. The MJC practice of airing such notices through the medium of radio would, in our view, therefore not be similar.

Moreover, edictal citation is used primarily in regard to parties located outside South Africa. While not everyone in the community will read notices placed in newspapers, in the future media, such as newspapers, could be used.

If no contact is made with the husband, a date for the hearing is set. On the date of the hearing, the ‘Shariah Court’ of the MJC hears the matter. If the applicant is successful in proving the requirements for her claim, then the order is granted. The *faskh* is orally announced to the wife in the husband’s absence. A written confirmation of the *faskh* is given to the wife. Presumably the husband will be informed if his address is known.

The *idda* consequence is explained and an *idda* document is also given to her. As indicated, the MJC allows the wife, during her *idda*, to re-marry (not reconcile with) only her husband against whom the *faskh* was issued, and not any other person. However, it is only after the expiration of the *idda* that a wife is free to marry anyone else. This would explain why a *faskh* certificate is only issued after the expiration of the *idda*. It is therefore the certificate, and not the written confirmation, which is recognised as proof of the divorce for official purposes. Such certificates are, for example, required and recognised as proof of a religious divorce in cases where parties were also civilly married.⁶⁵ Even though a *faskh* may be public knowledge, we have not been able to obtain a copy of the *faskh* issued to Fatima (the applicant in *Hassam v Jacobs*) nor have we been able to acquire samples of the various documents currently used and referred to in this process. While we understand that the MJC would want to protect the privacy of its clients and there is the rationale that the tribunal should first be subpoenaed before it can be expected to make copies of actual *faskhs* available, it has provided us with no logical explanation as to why blank copies of such forms could not be made available for research purposes. After the expiration of the *idda* the wife is free to re-marry anyone, including her former husband. While it may be hard to believe,

MJC statistics highlight that only one complaint was received from a husband who ‘questioned’ the *faskh*, but it was ‘responded to’ and ‘resolved’.⁶⁶

⁶⁴ Section 1 of the Divorce Act 70 of 1979 defines ‘divorce action’ to include an application for edictal citation of a party to the action or application.

⁶⁵ See s 5A of the Divorce Amendment Act 95 of 1996.

⁶⁶ See summary of the statistics released by the MJC for the second quarter (April–June) 2011 (n 63).

Given that the *faskh* currently only has Islamic law status in South Africa, the conclusion of such a process provides legal certainty. However, the novel interpretation in *Hassam v Jacobs* creates the wrong impression that this might be debatable.

(a) The MJC review and appeal process

The former husband may appeal the *faskh* if he has a valid ground. The MJC may, for example, overturn and/or withdraw a *faskh* as invalid if it was fraudulently obtained by the wife on the basis of false information provided by her. The MJC may simply not recognise a *faskh* if it was granted to a wife by an individual *imam* in his personal capacity, and not in his capacity as part of a judicial body. The MJC may do so regardless of the fact that the *imam* may be linked to it as a past or current member. The outcome in all these cases is that the parties are deemed to still be married to each other.

The MJC may review, through a process of appeal, cases brought to it and issue rulings on a case-by-case basis. The ruling would only be binding on the parties to the matter. Such a ruling must be distinguished from a *fatwa* which is a more general ruling or legal opinion on something that is already based on *Shari'a*, and thus only confirms it. Given that everyone can comply with a *fatwa* because it is ultimately based on *Shari'a*, it is applicable to all those who find themselves in the same situation as the parties to whom the *fatwa* was given, without a need to seek judicial intervention. None of the above instances were applicable to the applicant and the deceased in *Hassam v Jacobs*, and therefore did not contribute to any confusion in the case. However, with regard to the facts of the case, the MJC process does highlight that when approached by the applicant, the MJC in its capacity as a judicial body might possibly have ruled that due to the ignorance of both parties as regards the outcome of a *faskh* and the fact that they had continued to live together as husband and wife, in this instance the wife could inherit from the deceased.

What are also disconcerting are the practical problems pertaining to legal certainty that are created due to the fact that the MJC, as the 'mother body' in the Western Cape, may recognise as valid *faskhs* that are granted by some bodies, also located there, but may reject *faskhs* granted by others.

We contend that some intervention by the state remains necessary. As a starting point a clear directive should be issued indicating the status of the MJC as the main or 'default' organisation in the 'hierarchy' of tribunals in the Western Cape. This will give parties an idea as to which bodies' certificates are officially acceptable. While we do not have any data to provide, such a directive will also stem any abuse that may arise from possible 'forum shopping' given that the MJC's own statistics prove that it may be considerably easier for parties to obtain a *faskh* from a body not approved by the MJC than from the MJC itself.

Several bodies, for example, the Muslim Assembly and the Majlisush Shura Al Islami (both situated in Newfields, Cape Town) and the Mitchells Plain Welfare Organisation (MPWO), issue *faskhs* independently of the MJC. Spokespersons for both the two former bodies confirmed to us that they are not affiliated with the MJC, although the spokesperson for Majlisush indicated that it has reached an understanding with the MJC:

that they would not interfere in each other's cases, and that should a problem arise that requires advice, they would confer with each other on the matter. The MJC confirmed that it recognises the *faskhs* issued by both the Muslim Assembly and the Majlisush, and the policy of non-interference. There, however, appears to be an on-going breakdown in communication between the *ulama* of the MJC⁶⁷ and the MPWO,⁶⁸ who, it appears from news reports, have yet to resolve the '*faskh* issue' amicably between themselves. That the MJC has issued press releases and made radio announcements to the effect that it does not recognise *faskhs* granted by individuals, even if they are affiliated to it, is not sufficient to resolve the matter.

While our understanding is that all these tribunals work on their own, and also issue the *faskhs* on their own, problems may arise when the husband approaches the MJC to challenge the validity of the *faskh* that was issued to his wife by another body, which then raises the issue of recognition and therefore the validity of the *faskh*. Since the MJC does not recognise the *faskhs* issued by the MPWO, a couple that approaches the MJC would be deemed to be still married, but if they abide by the MPWO's order, they would be regarded as unmarried. In essence, the MJC's stance would be 'reversing' the MPWO's order without even looking at it. Let us consider the legal implications of such a situation on inheritance. For example, the wife is issued with a *faskh* certificate by the MPWO and her ex-husband subsequently dies testate. His will merely contains a general clause that his estate must be distributed in terms of the Islamic law of succession. A religious body or an *alim* then has to issue a certificate in this regard. This might cause problems. If the woman goes to the MPWO, she will not inherit from her deceased ex-husband because of her *faskh*. If, however, she goes to the MJC, she will be entitled to inherit from him because the MJC does not recognise the *faskh* issued by the MPWO and therefore deems her still to be his wife (widow).

We pose the following questions as essentially moral ones, although they do have real legal connotations. The MJC may be able to 're-do' the process and 're-issue' the *faskh* in cases brought by individual applicants, but what happens in the majority of such cases? Is it fair to the husband if the MJC, as the custodian body vested with the moral authority to guide the community, cannot do so? Is it also fair to the *ulama* of bodies like the MPWO (whose members may be affiliated with the MJC), who may be providing a much needed service in other areas to the community, to be treated as they are by the MJC?

(3) Different academic views

The academic view deeming a *faskh* to be revocable contributes to the general confusion and legal uncertainty surrounding it. It is contended that the confusion results partly from the failure of these academics to clearly distinguish between a *talaq* and a *faskh* as forms of divorce that are independent of each other, and which also have very different consequences. While both a *faskh* and an irrevocable *talaq* may have the same end result, that is, that the bond of marriage is ended, *faskh*, as a form of divorce, is completely

⁶⁷ See report by F Hendricks 'Fasakh only from MJC' Voice of the Cape (VOC) 19 September 2012 available at <http://www.vocfm.co.za/index.php/news/mpl/item/6416-fasakh-only-from-mjc> (accessed on 15 August 2013).

⁶⁸ See report by F Hendricks (n 56).

different to *talaq*, as are the consequences flowing from it.⁶⁹ As we understand it,⁷⁰ the more modern Arabic term ‘*tafriq*’ (literally, ‘separation’) refers to a divorce that occurs through a judicial process and takes the form of a judicial order. The judicial order may, depending on the ground, for example, non-maintenance, be either a judicial *talaq* (only in terms of the *Maliki* school of law) or a judicial *faskh* (in terms of all four *Sunni* schools, that is, *Maliki*, *Hanafi*, *Shafi'i* and *Hanbali*). While the consequences of a judicial *talaq* would be the same as the consequences of a *talaq* by the husband, the consequences of the *faskh* would be those pertaining to a *faskh*. A judicial *talaq* may, depending on the ground of divorce relied on, be either revocable or irrevocable in effect. A *faskh*, however, is always irrevocable in effect regardless of the ground relied on.

Of the views expressed on *faskh* in the two academic articles on the *Hassam v Jacobs* cases, Bakker⁷¹ correctly points out the misapplication of the Islamic law pertaining to a *faskh*'s revocability. Osman-Hyder⁷² refers to Vahed⁷³ as the source for her view that a *faskh* may be revocable. While she does concede that it may be difficult to establish it from the facts of the case, she gives no indication of the specific grounds for the *faskh* on which she may have based her view that it is revocable. However, all *faskhs* are irrevocable; only a ‘separation’ or ‘*tafriq*’ may be revocable. Vahed, in turn, relies on Rahman for his view that a *faskh* is revocable. While Rahman⁷⁴ uses the word ‘separation’, and gives the grounds for and the effects of separation, he does not clearly spell out the distinction between a judicial *talaq* and a judicial *faskh*. It is therefore contended that Vahed is incorrect when he refers to a *faskh* as revocable, and that he is probably referring to a separation in the sense that Rahman uses it. Nasir⁷⁵ uses *tafriq* to denote dissolution of a marriage by the court. It is therefore important with respect to *talaq* to distinguish between *talaq per se* (when the husband chooses to end the marriage) and its use as part of *tafriq* to denote dissolution of a marriage by an Islamic court.

Although Rahman⁷⁶ initially does not give the Arabic equivalent, he does so indirectly when he looks at the word ‘separation’ in the context of non-maintenance (in Syrian law), which he says is a separation (*tafriq*) by a judge and is equivalent to a revocable divorce. We engaged with Vahed in order to confirm his view. In order to corroborate his view, Vahed consulted with two *muftis* in KwaZulu-Natal. In their view, in determining whether a *faskh* may be revocable or not, consideration was given to a *talaq* and the number of times (permissible up to three times) that the husband may have pronounced it. We

⁶⁹ AK Toffar *Administration of Islamic Law of Marriage and Divorce in South Africa* (unpublished MA dissertation, University of Durban-Westville, 1993) 192.

⁷⁰ See the contributing chapter by N Moosa titled ‘The dissolution of a Muslim marriage’, especially the following sections: ‘Divorce by judicial process (*tafriq*)’; ‘*Tafriq*: Judicial *talaq* or judicial *faskh*’ and ‘Grounds for judicial divorce’, in the forthcoming book, provisionally titled *The Law of Divorce and Dissolution of Life Partnerships in South Africa*, to be published by Juta & Co in 2014.

⁷¹ See Bakker (n 12) 540–541.

⁷² See Osman-Hyder (n 12) 242–243.

⁷³ M Vahed ‘Divorce (*Talaq*) in Islamic Law’ in MA Vahed (ed) *Islamic Family Law* (2006) 43–44.

⁷⁴ TA Rahman *Code of Muslim Personal Law* vol 1 (1978). We refer to the first edition (1978), although Vahed uses a later (1985) reprint and therefore our page numbers may not correspond with his. At page 616, Rahman writes that a separation based on cruelty is equivalent to one irrevocable divorce (see further n 80). At page 589, he writes that a separation based on a defect has the effect of one irrevocable divorce. At page 617, he writes that a separation based on the ground that the whereabouts of the husband are unknown has the effect of a revocable divorce. At page 645, he writes that a separation based on non-maintenance has the effect of a revocable divorce. See text to n 76.

⁷⁵ JJ Nasir *The Islamic Law of Personal Status* vol XXIII Arab and Islamic Laws Series 3 ed (2002) 106 and 119.

⁷⁶ Rahman (n 74) 645, fn 31.

submit that this view adds to the confusion and appears to equate a *faskh* with a *talaq* and some of its consequences. A *faskh* may be issued to a woman by a religious court independently of the husband's right to *talaq* his wife or his participation in the process. Furthermore, when the husband issues the *talaq* (or the court does so on his behalf) or when the wife is granted a *faskh* there is no need for both of them as a 'couple' to be involved in the process, although the final outcome (*de facto* divorce) will ultimately have implications for both of them. Therefore, we contend that some *ulama*, including, as we explain below, tribunals like the MJC, and academics may have muddled the distinction between a *faskh* and a *talaq* in considering both to be revocable and may therefore also have contributed to the legal uncertainty.

The MJC refers to itself as a 'judiciary' on its website and indicates that its 'Talaaq Court' 'facilitates' *talaqs* while its 'Shariah Court' 'issues' *faskhs*.⁷⁷ This highlights to us that the MJC processes accord with the traditional view that divorce (*talaq*) is the exclusive right of the husband and that its role as a tribunal is merely to 'facilitate' a *talaq* on his behalf.

This also explains why it is generally the husband himself, rather than the presiding officer, who pronounces the *talaq* and why in nearly all instances it is the wife alone who approaches this tribunal to grant her a *faskh*. While the MJC regulates the *talaq* and the *faskh* through a fairly formal process and does not use the terms 'judicial *talaq*' and 'judicial *faskh*', this does not preclude the possibility that *ulama* of the MJC may have blurred the line between the *faskh* and *talaq* processes and overlapped with them. We draw this inference from the MJC's practice of 'divorce reversals' gleaned from the early study of the MJC by Toefy.⁷⁸ Nonetheless, it appears that ultimately the end result (converting applications to actual divorces) was the same. Furthermore, the MJC currently draws a clear distinction between the two terms and facilitates the two processes in two separate 'courts'.

It is contended that it is possible that if Fatima's application for a *faskh* had been based on the ground of non-maintenance,⁷⁹ it could have ended up as either a revocable judicial *talaq* (in terms of the *Maliki* school) or an irrevocable judicial *faskh* (in terms of the *Shafi'i* school). However, if her application had been motivated by the deceased's adultery as a ground for divorce, which encompasses the irretrievable breakdown of the (trust in the) marriage, namely, *shiqaq*, then the divorce would have been irrevocable in terms of both schools.⁸⁰ This would occur when an application is made for a *faskh* and the tribunal

⁷⁷ See Muslim Judicial Council '2nd Quarter Summary' (n 63).

⁷⁸ Toefy (n 56) 102 refers to a 'reversal divorce' as 'a female-initiated [faskh] divorce that ends in *talaq* or a male-initiated divorce [*talaq*] that ends in a *faskh*'. Toefy 146 further elaborates that there is a large reversal of potential *faskhs* to *talaqs* in cases brought by the wife for a *faskh*; in other words, the husband was asked to initiate the divorce in the end. As a result, he may reconcile with the wife during the *idda* of a revocable *talaq*, which he is encouraged to do by the tribunal. There are instances where 'female reversals' are actually anomalies because they refer to cases where the husband was the initial divorce applicant (*talaq*) but refused to attend subsequent consultations, which then resulted in the wife insisting on a divorce (*faskh*).

⁷⁹ For the type and consequences of a separation on the basis of non-maintenance in terms of the *Shafi'i* and *Maliki* schools see A Juzairee *Al-Fiqh Alaa Al-Mathaahib Al-Arba'ah [Jurisprudence According to the Four Schools of Thought]* vol 4 (2000) 382–383. Rahman (n 74) 641–645 does not clearly express the *Shafi'i* view with regard to non-maintenance. See also text to n 76.

⁸⁰ See Rahman (n 74) 591–616. Rahman uses the term '*shiqaq*' under the heading of a separation based on the ground of cruelty. On page 616, he says that such a separation has the effect of an irrevocable divorce. Given the husband's unqualified power and right to divorce, in terms of the *Maliki* school, the Muslim judge (*qadi*) is 'stepping into the shoes' of the husband to 'override' his power and to issue or pronounce the *talaq*. The *Maliki* school is apparently of the opinion that the arbitrators (or mediators) appointed in terms of the *Qur'an*ic injunctions (Q.4:35 and Q.4:128) in a bid to reconcile divorcing parties, are deemed to be representatives of the court. See n 52. If they are unable to reconcile the parties and believe that the marriage should be terminated,

committee or judicial panel decides that the judicial *talaq*, that is, the stepping into the shoes of the husband which is classically allowed by the *Maliki* school, would be the more appropriate vehicle to terminate the marriage in the case of non-maintenance. The judicial *talaq*, as opposed to the *faskh*, is revocable, it provides the husband with an opportunity to rectify the situation by improving his financial circumstances, and should reconciliation occur during the *idda* period of the wife, the marriage would continue without the need for a formal remarriage, which would be required if a *faskh* was issued.

If this scenario had occurred, and there is no obvious evidence to that effect in the case, then Fatima would still have been married to the deceased (as she had testified) and the couple would have been able to continue living together in a non-sinful way. We contend that the tribunal would not be motivated to allow this in a case where there is no possibility of revocability, for example, where there has been adultery.

The *Maliki* school of law is the only one (of the four) to make allowance for *shiqaq* as a ground for divorce, and in such an instance an irrevocable judicial *talaq* will be issued which has the same outcome as a *faskh*. There, therefore, would be no sense in following the *Maliki* school in order to get a judicial *talaq* because that would require the participation of the husband in the process. While committing adultery may also be a cause of the irretrievable breakdown of a civil marriage in terms of South African law, in terms of the MMB a *faskh* can be sought by the wife under *shiqaq*⁸¹ on the basis of her husband's marital infidelity.

Should Fatima indeed have received the *faskh*, as she said she did, and had no remarriage occurred, then the subsequent relationship between her and the deceased would have constituted adultery. This scenario highlights the complexity of the laws of divorce. Furthermore, our informal conversations with the MJC officer involved, namely, *Moulana* Keraan, highlight that he informed the deceased of the *faskh* and of the need for a remarriage. He would have been able to testify to this effect had he been called upon to do so.

While the loophole of revocability was possible, depending on the school of law followed and ground used, there is no information evident from the facts of the case that leads us to think that non-maintenance may have been the ground on which the *faskh* was based.

In any event, the *Shafi'i* school of law⁸² predominates in the MJC and this school only allows for judicial *faskhs* and not judicial *talaqs*. This would also explain why the MJC only uses the term '*faskh*' and, given its popular usage, why Fatima would have used and

they can order the husband to issue the *talaq*. If he refuses, the court will make its own finding and decision. In so doing the judge does not derogate from the right to divorce and at the same time the wife is able to obtain a divorce. In the view of the three other schools, the arbitrator's role is merely conciliatory, and they only recognise the doctrine of the *faskh*.

⁸¹ The secular term 'irretrievable breakdown', as a ground for a woman applying for a *faskh* in the MMB, proved problematic. The Islamic concept of '*shiqaq*' is therefore used instead to achieve the same result. A *faskh* can therefore be obtained by a wife from the court if '*discord between the spouses* has undermined the objects of marriage, including the foundational values of mutual love, affection, companionship and understanding, with the result that dissolution of the marriage is an option in the circumstances ([s]hiqa-q)' (clause 1 of the MMB, ground (j) for divorce under the definition of '*faskh*'). Our emphasis highlights the use of *shiqaq* and its formulation in the MMB as a ground for divorce, to indicate 'discord' between spouses. See text to n 59.

⁸² South African-born Muslims and their *ulama* are essentially followers of the *Hanafi* and *Shafi'i* schools. See Moosa (n 1) 151 and n 11. The applicant Fatima, a *Hanafite*, approached the MJC which serves an essentially *Shafi'i* community. The deceased was a *Shafi'ite*.

understood the ruling as such. Van Reenen J in the High Court case of *Hassam v Jacobs* did not call upon the *ulama* of the MJC or other experts to give oral evidence nor was a copy of the *faskh* certificate requested from the MJC. The only information that the judge had upon which to base his decision was that the deceased had two illegitimate children by Mariam, that he had torn up the *faskh* certificate, and that Fatima had lived with him for two years before his marriage to Mariam. While we can only speculate whether Mariam's extra-marital affair with the deceased could have been a factor in motivating Fatima to seek a *faskh*, we contend that, given Mariam's role in the matter, it is doubtful that Fatima's 'concerns about possibly jeopardising the interests'⁸³ of Mariam and her children were genuine.

It is contended that the MMB, once enacted, will provide a more permanent way out of the current impasse caused by the confusion and dissension pertaining to a *faskh*. While the MMB does not spell out the details of Islamic law, it proposes that, once Muslim marriages are recognised, only a secular court will be able to grant a legally recognised *faskh*, and that the MMB will further regulate a *faskh* as an irrevocable divorce. This ought to provide legal certainty. Understandably, given their reduced roles, Muslim role-players, such as the MJC, may not be readily amenable to this since it will detract from the current role of these religious tribunals. Nonetheless, they will inevitably continue to grant *faskhs*, although their certificates will only have evidentiary value in secular courts.

While understandably no reference was made to the latest (2010) version of the MMB because it was unpublished at the time the High Court judgment was handed down, this does not explain why no reference was made to the electronically accessible prior (2003) version on which the MMB is based, especially since Van Reenen J was aware of the South African Law Reform Commission (SALRC) Report on Islamic Marriages and Related Matters containing it.⁸⁴ Expert opinion was not sought on the matter and the uninformed secular court accepted only the applicant wife's explanation that the *faskh* was revocable. Given that a *faskh* may only be granted to a wife on cogent grounds, it remains puzzling that the judge could deem the *faskh* to be revocable in effect (like a *talaq*), without giving any indication of the grounds on which Fatima (the applicant) had based her application for a *faskh* or even deeming it important enough to enquire about it from her.

The success of the applicant hinged almost entirely on her testimony and her credibility as a witness. The case not only demonstrated a clear deviation from Islamic law, but its outcome was, in our opinion, unnecessarily contrived, if not 'forced', for the following reasons: the deviation resulted in the 'resurrection' not only of a Muslim marriage between the applicant and the deceased that in fact no longer existed but, inadvertently, also of its polygynous nature (the deceased had only married Mariam subsequent to the applicant *de facto* divorcing him). At the time of his death, therefore, only a *de facto* monogamous marriage existed between the deceased and the third respondent, Mariam.

Reconciliation between the applicant and the deceased ought not to have been possible once an irrevocable *faskh* was issued. Although the decisions of *ulama* may not have legal

⁸³ See *Hassam v Jacobs* (n 10) para 7.

⁸⁴ The judge referred to the fact that the SALRC had given recognition to Muslim polygynous marriages in this Report. See *Hassam v Jacobs* (n 10) para 18 and n 7.

binding force in terms of secular law, they are legally binding in terms of Islamic law. Local Muslims deem *ulama* to be the custodians of Islam and, therefore, those parties who choose to submit to their authority accord their decisions both moral and legal force.

Although the deceased was therefore both morally and legally compelled to accept the ruling as valid, his rejection thereof could either have meant that he freely chose to ignore the binding ruling because it was expedient for him to do so or that he deliberately did not want to abide by the ruling. The parties' subsequent reconciliation could therefore initially have been construed as amounting to 'living in sin', and since the deceased later also married Mariam, it could then also have been construed as adultery on the part of both parties. In terms of Islamic law, however, all of this was irrelevant once an irrevocable *faskh* had been issued, regardless of whether the deceased had rejected it or not.

Van Reenen J's misapplication of Islamic law ultimately resulted in the grant of both a right to an inheritance (in terms of the ISA) and a claim for support (in terms of the MSSA) to the *de facto* divorced applicant, to both of which she would not have been entitled in terms of Islamic law nor, for that matter, South African law. As a result, some of the lawful descendants (children) of the deceased were precluded from benefitting from their father's intestate estate. We were informally informed that the executor was made aware of the existence of Wasielah's children by the applicant. The facts of this case, therefore, did not justify its outcome.

VII Practical implications of, and lessons to be learned from, the case

The MJC processes may have undergone major improvements since the case, and possibly even because of it, but there is still room for improvement. The case clearly indicates that the applicant had obtained a '*faskh*' and a certificate to that effect. The MJC would only have granted her the *faskh* on cogent grounds. The applicant and the deceased did not re-marry each other subsequent to the *faskh* being obtained. They had an opportunity to do so after her *idda* and even during it according to the practice of the MJC. The deceased did not appeal the MJC process in a bid to overturn the *faskh* after it had come to his attention. This highlights that there was no fraud involved on the part of the applicant to justify such an application. The applicant did not approach the MJC to review her case after the death of the deceased although her testimony makes it clear that both she and the deceased may have misunderstood the consequences of a *faskh*. She admitted that although a certificate had in fact been obtained by her, it was destroyed by the deceased. The following steps, if heeded, will avoid a future recurrence of such a situation. We have indicated that in South Africa, the grant of a civil divorce is understood as legally and *de facto* terminating a marriage, but that this is not necessarily the case in every instance of a Muslim divorce. However, the *faskh* form of divorce is a final termination of a Muslim marriage and should therefore be made public knowledge.

Ideally, a copy of the certificate of *faskh* which is issued by the tribunal to a wife once the process has been finalised is also issued to the husband and so brought to his attention. Often this is not the case because either he did not participate in the process or such communication did not reach him. However, even when the husband does participate in the process and a copy is given to each of the parties, they may not necessarily understand the implications of the final outcome of such a judicial dissolution of their marriage. This

therefore needs to be orally spelled out to them in simple language at the very beginning of the process, during the process, and, if need be, reiterated at its conclusion. Given the one-sided nature of the *faskh* process, there does not appear to be as much scope for counselling and reconciliation as there is in the *talaq* process.

In view of the confusion of the consequences of an irrevocable *faskh* with those of a *talaq*, which may either be revocable (marriage still subsists) or irrevocable (marriage is terminated) in effect, as an additional precaution the certificate must clearly state in a paragraph, in simple English or Afrikaans, that the marriage has been terminated by a *faskh* with final and irrevocable effect. It will also be helpful if the ground on which it was based is indicated, as well as the need for a remarriage either between the parties or with a third person. Some parties may be able to read Arabic but most locals do not understand it, and most Muslims in the Western Cape also speak Afrikaans. This will absolve the religious tribunal from any misunderstanding or confusion that may occur.

If, however, the document evidencing the *faskh* is no longer in existence, then the following steps may also be of assistance. We have indicated that the very recent innovation of the MJC of using the radio as a medium of communication in order to involve the husband while the *faskh* is still in the process of being finalised may not be a step in the right legal direction. However, placing a list of names of the persons (wives) to whom official certificates of *faskh* were issued, on an internet-based register on the website of the issuing authority (most of these bodies have websites), will facilitate several things. It will make the *faskh* public knowledge. It will allow a husband, who may not have participated in the process either by choice or because he only subsequently became aware of the wife's application, to view the site and check whether it was granted, and, if it was fraudulently obtained, to engage with the officials involved to establish a review process. At the MJC this occurs through a process of appeal, and if the *faskh* is overturned or set aside, there will be no need for the parties to re-marry each other.

Given the lack of emotional and economic protection for women evident in Muslim marriages without ANCs, Muslim men and women also have a moral obligation to draft formal marriage contracts containing detailed conditions prior to their marriage, when women have optimal bargaining power, and which will ensure such protection upon the termination of the marriage by death or divorce. The same applies to the execution of wills regulating their usually separate estates in order to better give effect to their intentions in this regard. While there is a real danger that most Islamic wills merely direct that *Shari'a* must apply to the deceased estate, it is possible for the deceased to augment the limited shares to which wives and children, including illegitimate children, are entitled within the framework of Islamic law. The deceased in *Hassam v Jacobs* died intestate with deleterious consequences for the financial and emotional wellbeing of his extended family. Ultimately, in order to protect vulnerable widows and dependent children when husbands fail to do so, the legislature needs to take the lead through the enactment of the MMB.

VIII Conclusion

The current process followed by the MJC is more structured and formal than it was in 1998 when the applicant in *Hassam v Jacobs* obtained her *faskh*. If such a process had

been available to her at that time, then it could have been expected of her to have been fully aware of a *faskh*'s outcome.

Since we do not know what the process was like earlier, the applicant's version of what had in fact transpired may indeed reflect what the process was at that time. However, it is contended that it is possible that the applicant was essentially dishonest in bringing the case while she knew (or reasonably ought to have known) that she was no longer married to the deceased at the time of his death.

The applicant understandably preferred to keep the MJC, which granted her *faskh*, out of the picture as any evidence from it may have irreparably harmed her case. In view of the fact that if the first respondent, the executor Mr Jacobs, had called for evidence from the MJC, it would have clinched the case for Mariam (the third respondent), the question has to be asked as to why he or any of the other respondents did not do so. It is contended that a major motivating consideration could have been the fact that such inaction would not only benefit both Fatima and Mariam, but ultimately all Muslim women as well.

The judicial divorce (*faskh*) was an essential ingredient for the success of this case. The applicant admits that there was a *faskh*, and then argues that by the mere act of her husband tearing up the document evidencing it, it became null and void – and the judge accepts this at face value. The first respondent denies that the marriage existed at the time of the death of the deceased but fails to prove this. If it was possible for us to informally and easily glean the information necessary to put the pieces of the puzzle together, why was it not possible for the judge to do so as well? Perhaps this is a civil procedure question with a procedurally sensible answer.

However, our investigation also highlights that there is some confusion among various stakeholders (*ulama*, tribunals and academics) whose views may diverge from an internationally accepted understanding of a *faskh* as being irrevocable in nature. There is also dissension among *ulama* in the same province as to the validity of each other's *faskhs*. If this is the case, what then can be expected from lay persons, such as the applicant? While a *faskh* may be more difficult to obtain from the MJC than elsewhere in the Western Cape, clearly both Wasielah (in 1976/1977) and Fatima (1998) had been successful in obtaining a *faskh* from the MJC and were not ignorant of their right as Muslim women to be able to initiate and obtain such a divorce. Does this mean that these wives did not know what the outcome of such a divorce was, that is, the immediate dissolution of their marriages? Wasielah's marriage to another man clearly indicates that she understood the outcome. This begs the question: was Fatima's averred ignorance truly based on the process being complicated, even though her *faskh* was granted by the same judicial body which granted Wasielah her *faskh* twenty years earlier?

Having 'heard' all sides, our 'verdict' nonetheless remains the same: although the High Court's decision is ultimately beneficial, its application of Islamic law remains flawed. While there may be some local confusion and dissension pertaining to its theoretical and practical application, the Islamic law relating to a *faskh* and its consequences is clear: not only is a *faskh* an irrevocable form of divorce, but 'reconciliation' is allowed only through remarriage of the parties after the expiration of the *idda* period observed by the wife rather than during it. The High Court case is therefore a harbinger of the potential

misapplication of the Islamic law pertaining to the *faskh* in future cases where parties, in the same position as the applicant, may rely on it to claim relief. While the integrity of the civil process may not have been tarnished thereby, the judgment is a typical example of the difficulties a secular court will be faced with if religious expertise is not sought in such complex matters as divorce.

In further delaying recognition of Muslim marriages by delaying the implementation of the MMB, the current government is no less guilty in its treatment of Muslim women than the former apartheid government and its ‘separate but equal’ policies. Ultimately, it is a question of both education and compliance.